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IN THE

Supreme Court of the United States

October Term, 1950.

No. 311

GEORGE T. GOGGIN, Receiver of the Estate of SALSBURY MOTORS, INC.,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Respondent.

Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GENDEL & RASKOFF, and
BERNARD SHAPIRO,
810 Oviatt Building, Los Angeles 14,
Attorneys for the Receiver.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George T. Goggin, as receiver of the estate of Salsbury Motors, Inc., hereby petitions for a rehearing of this Court's denial on November 6, 1950, of the Petition for Writ of Certiorari heretofore filed by the said receiver.

Grounds of Petition for Rehearing.

In his original petition before this Honorable Court, your petitioner urged several grounds whereby, on the merits, the writ should issue. The last ground stated therein was the recent California case of *Engleman v. Bank of America* (July 7, 1950), 98 A. C. A. 509, which supports petitioner's position and is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit.

Your petitioner now respectfully urges that if this Honorable Court denies the issuance of the writ, it should remand the cause to the United States Court of Appeals for the Ninth Circuit so that said Court may have an opportunity to examine its judgment and opinion in the light of *Engleman v. Bank of America* which was decided subsequent to the rendering of the Court of Appeals' opinion herein. Indeed, in that opinion the Court stated:

> "However, no California case has been found which interprets such statute in the circumstances obtaining here." [Tr. 127.]

The *Engleman* case is one where the Bank of America sought to assert its banker's lien to a certain fund and the California District Court of Appeal flatly held that where the Bank collects money for a customer under instructions that said funds are to be used to satisfy the obligation of the customer "or to be paid or credited to him annually," the Bank "was not entitled to hold it, under its alleged banker's lien, to secure another obligation." (98 A. C. A. at 513.)

The *Engleman* case is so similar to the instant case that it would be unfair to permit a final determination of this

cause unless this Honorable Court or the Court of Appeals has had an opportunity to study the latest and most pertinent views of the controlling state court on the question. Although the extent of the banker's lien has been declared by the California courts to be a codification of the rule of common law, it is clear that the decisions of the California courts are of controlling significance when the issue arises in the State of California.

Your petitioner urgently stresses the wisdom and appropriateness of this proposed alternative disposition; that is, the remanding of this cause to the United States Court of Appeals for the Ninth Circuit so that said Court may review its ruling in the light of the *Engleman* case. It is apparent from the Court of Appeals' opinions herein that said Court was deeply concerned over the issues raised by the within appeal and gave extended consideration to these problems, both in the execution of its original opinion and in its opinion on rehearing. At that time it appeared that there was no California case strongly touching upon these issues. Your petitioner sincerely believes and represents that the judges of the United States Court of Appeals for the Ninth Circuit are concerned with controlling state law toward the end that their opinion in this case shall be reconciled with the latest and governing declarations of the state appellate courts on the legal issues before them. No useful purpose could be served, and indeed serious harm would be caused by, the lack of reconciliation between the outstanding opinion herein and the holding and language of the California District Court of Appeal in the *Engleman* case. At the risk of repetition we respectfully point out that the opinion of the United States Court of Appeals was filed on June 23, 1950, and the opinion of the California District Court of Appeal was

filed on July 7, 1950, and not reported until some time thereafter and not called to the attention of the United States Court of Appeals at any time owing to the lack of knowledge by your petitioner of its pendency.

Wherefore, your petitioner prays that this Honorable Court reconsider its Order of November 6, 1950, denying a writ of certiorari herein and issue a writ of certiorari reviewing the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 23, 1950, or, in the alternative, remand the within cause to said Court of Appeals for a reconsideration of the case in the light of *Engleman v. Bank of America* (July 7, 1950), 98 A. C. A. 509.

Respectfully submitted,

GENDEL & RASKOFF, and
BERNARD SHAPIRO,
By MARTIN GENDEL,
Attorneys for the Receiver.

State of California, County of Los Angeles—ss.

Martin Gendel being first duly sworn, deposes and says: That he is the attorney for the petitioner named in the foregoing Petition for Rehearing of Denial of Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit; that he has read the foregoing and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated upon his information or belief, and as to those matters that he believes them to be true; and that the foregoing Petition For Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit is presented in good faith and not for delay and that said petition is restricted to a ground not previously presented.

MARTIN GENDEL.

Subscribed and sworn to before me this 17th day of November, 1950.

M. ALLIS,

Notary Public in and for said County and State of California.

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OCTOBER TERM, 1950.

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REPLY TO PETITION FOR REHEARING.

The sole point urged in the petition for rehearing is that a subsequent decision of the California District Court of Appeal[1] is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit and that therefore this Court should grant certiorari or remand the case to the Court of Appeals for further consideration.

In the petition for certiorari (pp. 25-28) it was argued at length that the decision of the Court of Appeals was in conflict with California law because contrary to this same decision of the California District Court of Appeal.

[1]*Engleman v. Bank of America* (July 7, 1950), 98 A. C. A. 509.

It is respectfully submitted that the case of *Engleman v. Bank of America,* cited in the petition for certiorari and again in the petition for rehearing, is not, on its facts, comparable to the facts in the present case. Further, the legal principles stated by the California Court with respect to the application of a banker's lien are entirely in conformity with the principles set forth in the opinion of the Court of Appeals. (See Brief in Opposition, p. 12.)

It is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

HUGO A. STEINMEYER,

ROBERT H. FABIAN,

Attorneys for Respondent.

SAMUEL B. STEWART, JR.,

Of Counsel.